

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition for Expedited Declaratory Ruling and
Exemption by the American Association of
Healthcare Administrative Management

CG No. 02-278

COMMENTS OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES

The National Association of Chain Drug Stores (“NACDS”), through its attorneys, files these comments in support of the Petition for Expedited Declaratory Ruling and Exemption (“Petition”) filed on October 21, 2014, by the American Association of Healthcare Administrative Management (“AAHAM”).¹ The Petition seeks clarification of the application of the Telephone Consumer Protection Act (“TCPA”) and related Federal Communications Commission (“FCC” or “Commission”) rules to certain healthcare related calls made to wireless phones. AAHAM’s specific request is for the FCC to confirm that the provision of a wireless telephone number by an individual to a healthcare provider constitutes “prior express consent” for healthcare calls to that telephone number either by or on behalf of the healthcare provider. NACDS supports this request as reasonable and necessary to achieve positive health outcomes

¹ See Consumer and Governmental Affairs Bureau Public Notice, DA 14-1847, released December 17, 2014, seeking comment on the Petition.

without compromising any reasonable privacy expectations.²

NACDS represents traditional drug stores, supermarkets and mass merchants with pharmacies. In the United States, these various types of chain drug stores operate more than 40,000 pharmacies and employ over 175,000 pharmacists, who fill over 2.7 billion prescriptions yearly.³ Pharmacists are able to help patients use prescribed medicines correctly and safely, while offering services that improve both patient health outcomes and healthcare affordability. One of the increasingly critical tools in the pharmacist toolbox is the ability to quickly and efficiently contact patients on their phones to alert them to information related to their prescriptions, such as notifications that the patient's supply of a maintenance medication is about to run out and is due under the doctor's orders to be refilled. These types of notifications have demonstrated efficacy in improving patient adherence to a doctor-prescribed course of treatment. Commission action on the declaratory ruling sought by AAHAM is needed to confirm what the Commission already has observed, namely that a patient's provision of a wireless phone number demonstrates "prior express consent" to be contacted at that number for healthcare notifications,⁴

² See *Rules 34233 and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 71 Fed. Reg. at 34241 (June 11, 2012) ("Rules and Regulations, June 2012") which states that "[w]ith respect to the privacy concerns that the TCPA was intended to protect, the Commission believes that prerecorded health care-related calls to residential lines, when subject to HIPAA, do not tread heavily upon the consumer privacy interests because these calls are placed by the consumer's healthcare provider to the consumer and concern the consumer's health. Moreover, the exemption the Commission adopts in document FCC 12-21 does not leave the consumer without protection. The protections provided by HIPAA safeguard privacy concerns. Under the second prong of the TCPA exemption provision, which requires that such calls not include an unsolicited advertisement, the Commission finds the calls at issue here are intended to communicate health care-related information rather than to offer property, goods, or services and conclude that such calls are not unsolicited advertisements."

³ NACDS members also include more than 800 supplier partners and nearly 40 international members representing 13 countries. For more information about NACDS, visit www.NACDS.org.

⁴ As noted by AAHAM, "healthcare messages" have a distinct definition under HIPAA regulations. See Petition at 3, fn. 7 (*citing* 45 C.F.R. § 160.103). Importantly, the FCC already has recognized all such HIPAA calls as non-telemarketing calls, see *Rules and Regulations Implementing the Telephone*

such as prescription refill reminder calls.⁵

I. A Bright Line Consent Rule for Making HIPPA Healthcare-Related Calls to Wireless Numbers Is Necessary and Desirable

The AAHAM Petition seeks clarification in an area of TCPA law and policy that at this point should be settled, but is still ripe for vexatious litigation due at least in part to the statutory damages contained in the TCPA that can represent a windfall to the plaintiffs' bar. That question is a clarification of what constitutes adequate "consent" of a patient to be called by a healthcare provider on his or her wireless phone for a healthcare purpose, such as a prescription refill reminder program. While the Commission already answered that question in the update of its TCPA rules in 2012,⁶ frivolous lawsuits containing tortured theories of alleged Commission rule violations focusing on consent continue to be filed. The ever-present threat of these lawsuits threatens the availability, the scope and the efficacy of prescription refill and pharmacy notification programs nationwide. Thus, NACDS supports the AAHAM Petition as a means to provide even greater clarity on the question of consent to call a patient's wireless phone number.

As the AAHAM Petition observes, the TCPA itself does not define what constitutes "prior express consent" to be called, thus leaving a critical role for the Commission to interpret

Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012) at ¶¶26-27, fn. 195 ("2012 TCPA Order"); see also, fn. 2, *supra*, which the FCC's response to this Petition may confirm.

⁵ A prescription refill reminder is a non-telemarketing communication between a pharmacy and a patient reminding the patient to fill a prescription or obtain a medication. Prescription refill reminders take different forms, including:

1. a communication reminding a patient to refill a prescription medication or prescription medical supply for which refills are still available on that prescription;
2. a communication reminding a patient that a current prescription for a maintenance medication (such as cholesterol medication) has no more refills available, or;
3. a communication reminding a patient to receive an immunization (such as an annual flu shot) when the patient received the immunization from the pharmacy previously.

⁶ See 2012 TCPA Order at ¶¶ 57-65.

that requirement and its application across the increasing base of wireless-only patients. From NACDS' member perspective, public health outcomes would be advanced if practical rules of the road can be confirmed for consensual calls made to wireless phones for healthcare related purposes. It is not disputed that the Commission has the ability to interpret the TCPA to support this desirable public policy framework. The AAHAM Petition provides a vehicle for the agency to confirm that healthcare calls by pharmacies to wireless phones, including prescription refill reminder calls from pharmacies, are covered healthcare calls subject to a HIPAA exemption under Commission rules and that consent in this case is demonstrated by the provision of a wireless phone number to the pharmacy by the individual or on his or her behalf.

A. The FCC Has the Authority to Clarify the Application of its Consent Rules

As AAHAM correctly observes, the TCPA expressly delegates authority to the Commission to determine questions of individual consent to receive different types of calls. Over the course of more than twenty years, the Commission, through rulemaking and in declaratory rulings, has interpreted many aspects of the TCPA as it has modified and updated its rules to account for evolving circumstances. Notwithstanding the fact that wireless phones are used today by consumers very differently than they were in 1991 when the TCPA was enacted, and today most wireless service pricing is effectively unmetered, the Commission has to manage within a statutory framework that effectively treats all autodialed or prerecorded calls to wireless phones as potentially unwelcome calls, regardless of their nature and importance. In a world where approximately 40% of individuals no longer have residential landline phones, permitting pharmacists and other healthcare providers to make healthcare calls, such as prescription notification calls, to wireless phones is critical to achieving better health outcomes. Fortunately, the Commission has the legal authority to clarify that the provision of a wireless number by or on behalf of a patient constitutes adequate consent for covered healthcare calls to that number by a

pharmacist or other HIPAA-regulated healthcare provider, consistent with the Commission's recognition in 2012 of the special policy status of such HIPAA healthcare calls.

Patients who provide their wireless numbers to pharmacies want and need to receive calls with respect to the delivery of their healthcare. That expectation of being contacted for follow-up status or reminder calls at the telephone number voluntarily provided aligns with the decision to provide the wireless number as the contact number in the first instance. Thus, healthcare calls, such as prescription refill or notification calls of the kind pharmacies make, should retain the special status outlined in the *2012 TCPA Order* and reflected in the FCC's rules governing consent to call wireless phone numbers.

The Commission has shown over time that it can attune its rules and requirements to harmonize, where possible, with the laws, rules and policy imperatives of other federal agencies. This ability is illustrated well in the Commission's *2012 TCPA Order*, which reviewed FCC rule requirements in an attempt to harmonize them with those of the Federal Trade Commission ("FTC") as well as those of the US Department of Health and Human Services ("HHS"). Both HHS and the FTC previously had determined that refill reminder and similar prescription notification calls are beneficial health related messages that should have special public policy status. HHS, for example, stated that in order "to ensure essential healthcare communications are not impeded," the prohibition on "marketing" under HIPAA specifically excludes communications made "[t]o provide refill reminders or otherwise communicate about a drug or biologic that is currently being prescribed for the individual . . ."⁷

⁷ See The HIPAA Privacy Rule and Refill Reminders and Other Communications about a Drug or Biologic Currently Being Prescribed for the Individual, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/marketingrefillreminder.html> (last visited January 13, 2015); see also 45 C.F.R. § 164.501.

The FTC similarly endorsed these calls as “generating demonstrable improvements in patient outcomes.”⁸ As a result, the FTC exempted these calls from its Telemarketing Sales Rule (“TSR”), which has its own set of conditions under which informational calling is permitted without written consent. The FTC’s exemption of prerecorded covered health calls from any written consent requirement was deliberate. The FTC specifically endorsed the exemption, reasoning that “[w]hile proactive patients who are attentive to their healthcare may be likely to provide a written agreement to authorize prerecorded messages from their healthcare providers, such reminder and other communications are most needed by the patients who are least attentive to their healthcare—those who ‘frequently procrastinate or make ill-informed decisions’—and therefore are least likely to get around to responding to requests for authorization to receive such calls.”⁹

The Commission, in its *2012 TCPA Order*, looked to both the HHS and FTC rules on these issues and concluded that Commission rules also should reflect a special status for autodialed or pre-recorded covered healthcare calls; specifically that such calls would represent an exception from the general TCPA consent requirements. As the *2012 TCPA Order* recognized, an exemption “advances the statutory goal of maximizing consistency with the FTC’s rules, and our record affirmatively supports adopting the FTC’s approach.”¹⁰

It is not disputed that a large and ever growing portion of the US population no longer has a residential landline phone, and increasingly people choose to provide their wireless number as their preferred point of contact for both commercial and non-commercial activities. Similarly,

⁸ Telemarketing Sales Rule (“TSR”) Final Rule Amendments, 73 Fed. Reg. 51164, 51191 (Aug. 29, 2008) (codified at 16 C.F.R. §§ 310.1 *et seq.*).

⁹ *Id.* at TSR Final Rule Amendments, 73 Fed. Reg. 51164, 51191 (Aug. 29, 2008) (codified at 16 C.F.R. §§ 310.1 *et seq.*) (quotations omitted).

¹⁰ *2012 TCPA Order* at ¶ 60.

it is not surprising that permissible HHS and FTC healthcare related message rules do not differentiate between these calls when made to residential landline or to wireless phones because that is a distinction without a difference in terms of national health policy. Recognizing that the TCPA addresses contacts made to residential landline and wireless phone numbers differently based on the differences in end user pricing that existed for those services in 1991, current Commission rules also reflect a distinction not presented in HHS or FTC law and policy.¹¹

Thus, clarification of FCC rules on consent as applied to prescription refill reminder calls and other pharmacy healthcare notifications made to patients' wireless phones is desirable, assuming the Commission conforms its rules as closely as possible to those of these other agencies. There should be no confusion about the acceptability of refill reminder programs that include calls to wireless phones where the called party, or his or her representative, has provided that number as the contact phone number.¹² Building upon the Commission's prior determinations that voluntary provision of a wireless phone number constitutes consent to be called for healthcare related matters, the Commission should reconfirm that determination.

B. The Public Policy Case for Encouraging Prescription Notification or Refill Reminder Calls to Wireless Phones is Irrefutable.

As noted above, neither HHS nor FTC rules differentiate between wireless calls and

¹¹ Notably, the Commission's Public Notice on the AAHAM Petition states that: "The Commission has implemented different rules for HIPAA exemptions for calls to residential numbers and wireless numbers. HIPAA calls using an artificial or prerecorded voice to a residential number are exempt from the consent requirement. *See* 47 C.F.R. section 64.1200(a)(3)(v). HIPAA-covered autodialed or prerecorded calls to a wireless number are exempt from the written consent requirement. *See* 47 C.F.R. section 64.1200(a)(2). These calls are still covered by the general consent requirement in 64.1200(a)(1)." Public Notice at fn. 7.

¹² There may be cases where a doctor's office or a person representing a patient, when the patient is unable to be present due to illness, provides the patient's wireless number to a pharmacy in connection with a prescription. The provision of that phone number by a third party should not be treated differently with respect to the consent to call the number provided by a person with apparent authority and the requisite number.

residential landline calls in affirming the public health need for and positive health outcomes generated by prescription notification or refill programs run by pharmacies. Both agencies were convinced by studies showing that such calls significantly improve adherence to treatment plans by at risk populations of patients as compared to no notifications or reminders. This evidence should not be lost on the Commission as it considers the AAHAM Petition.

As the Commission previously recognized, any tailoring of consent for covered healthcare messages would not have large scale repercussions that could be seen as jeopardizing reasonable privacy expectations. A patient's provision of a wireless phone number to a pharmacy would not generate substantial additional or unrelated calls. No marketing campaign would ensue. Calls would be made solely to the number provided and not to randomly autodialed populations. No block of numbers would be tied up by a marketer making calls so that public safety might be compromised.

Moreover, the individual choosing to provide his or her wireless phone number to a pharmacist always has the ability when a call is made to rescind permission to call that wireless number in the future. Thus, there would always be control over permission to be called by the individual consenting to be called on a wireless device.

Finally, while AAHAM also seeks clarification on whether covered health calls can be made to patients without prior express consent if they are made "free to the end user," NACDS is unaware that any such program for uncharged voice calls to wireless phones exists or currently would be practical to support as a ready alternative to clarifying the application of existing consent requirements. Thus, NACDS urges the Commission to use its time and effort to make plain that there exists a bright line, real world practical framework for covered healthcare messages; namely that pharmacists can contact wireless patients about their prescriptions at the phone number that was provided to the pharmacy by or on behalf of the patient. That step would


be more effective and would be available immediately.

II. CONCLUSION

For the reasons provided herein, the Commission has the legal authority to clarify what constitutes appropriate consent for covered HIPAA healthcare calls to wireless numbers and should reaffirm its recognition of the public policy reasons both HHS and the FTC found compelling for promoting prescription refill reminders and notification programs. The Commission has the ability to find “prior express consent” for healthcare calls from the provision of a wireless phone number to a pharmacist or other HIPAA healthcare provider by or on behalf of an individual, unless or until such consent is revoked. NACDS urges that any clarification related to HIPAA healthcare calls specifically include prescription refill reminder and notification programs by pharmacies.

Respectfully submitted,

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National Association of Chain Drug Stores

Don M. Bell, III
General Counsel
Mary Ellen Kleiman
Associate General Counsel
1776 Wilson Blvd.
Suite 200
Arlington, VA 22209
(703) 837-4327

